

JOH Consultancy LLP

February 2013 Technical Update

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Farepak Report

The Insolvency Service's review of the issues that arose in the Farepak case have been reported and may be found here <http://www.bis.gov.uk/insolvency/news/news-stories/2012/Dec/Farepak%20final%20report>. The two issues which may impact IPs and their involvement in the process are: "distinguishing between the responsibility of each director for the conduct complained of" and "ensuring that witnesses are familiar with their evidence, its relevance and significance (including all exhibits) and are clear about the process and what is expected of them". The first was detailed in the BIS guidance issued recently on reporting under the CDDA. The second issue, one assumes, will be addressed by BIS providing more support to IPs when they require evidence to be given by them.

Trustee ordered to pay 30% of the costs

In **Nutting and another (as joint trustees of the estate of Benya Meain Khaliq (a bankrupt)) v Khaliq and another**[2013] All ER (D) 58 (Jan) the Trustee applied to enforce a possession order and the wife successful appealed. The court held and reiterated the principle that a trustee in bankruptcy was only required to meet the costs personally where his conduct had fallen below that of an insolvency

practitioner acting reasonably. As the trustees' conduct had been part reasonable and part unreasonable, they were entitled to a proportion of their costs and this was capped at 30%, not the 60 % originally awarded.

Attempt to deny an issue already litigated was struck out as an abuse of process

In **Secretary of State for Business, Innovation and Skills v Potiwal** [2012] All ER (D) 250 (Dec) the defendant sought to deny knowledge of the company's VAT fraud and BIS sought to have the denial struck out as inconsistent with a judgment of the United Kingdom VAT & Duties Tribunal. The Court held that the defendant was not estopped *per rem judicatam* from denying that he had the requisite knowledge, but the cost to the taxpayer to re-litigate the issue would be manifestly unfair and the re-litigation would bring the administration of justice into disrepute.

COMI again

In **O'Donnell and another v Governor and Company of the Bank of Ireland** [2012] All ER (D) 257 (Dec) the court held that two individuals with properties in various locations including the UK had not changed their COMI prior to the presentation of the petition just because a number of years ago they had purchased a property in the UK.

SIP 13

There is an overlap between the requirements of SIP 8 and SIP 13 so it seems appropriate to review SIP 13 this month.

Para 4.1.3

This paragraph is a reminder of the disclosure requirements at the s98 meeting where a connected party transaction has occurred in the 12 months before the meeting.

Para 4.2

It is probably a timely reminder to all to bear in mind who you are advising prior to a S98 meeting. It is understood that advice is being given to the company and not the directors, but sometimes correspondence may create the perception of that advice being given to the directors personally. Remember to address correspondence to "The Board of Directors".

More importantly though, if a sale of the assets is to occur prior to the s98 meeting and you are advising the company, then your advice should include adherence to the Companies Act 2006, and where appropriate shareholder approval should be obtained. Also the sale should be for value and the director purchasing the assets should seek his own independent advice.

This paragraph in the SIP seems to make the assumption that you are personally advising the directors. You will need to determine yourself who you are advising.

Para 4.2.3

If you are advising the directors personally then a conflict of interest will be created due to the need of the office holder to investigate antecedent transactions.

Para 5.2

When selling assets as the office holder, whilst full exposure to the market is not required, there needs to be a reason why this is not appropriate. Remember SIP 1 and if you decide not to fully market the assets, complete a file note to document your decision making process and add this information to your report to creditors.

Legal advice privilege

In the case of R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another 2013 UKSC1 it was held that accountants were not entitled to claim legal advice privilege, even if the privilege would have been able to be claimed if a member of the legal profession had given the same advice.

Proposed changes to EU insolvency law

The review of EU insolvency law has finished and the proposed changes have been published and are available at http://ec.europa.eu/justice/newsroom/civil/news/121212_en.htm. The main proposed changes are: clearer guidelines on COMI for both corporate entities and individuals, allowing courts in application to issue secondary proceedings to refuse if it is in the interests of local creditors to do so, to have a central publicly accessible electronic register court decisions in cross-border insolvency cases, and finally the ability to coordinate insolvency proceedings concerning different members of the same group of companies.

FSA and interest rate hedging products

The FSA has completed and printed pilot findings on interest rate hedging products (IRHP) and has found that there was considerable mis-selling. It had been agreed with eleven banks that they review IRHPs sold to small business from 1 December 2001 and in particular to the "non-sophisticated" customers. It would seem appropriate for IPs dealing with corporate cases to identify whether they have an IRHP right of action.

Single Complaints Gateway

Whether we want it or not, the Single Complaints Gateway will be in place shortly. Some key aspects of this are that the gateway will be operated by the Insolvency

Service, common sanctions guidance will be published which will be used by regulators when deciding upon a sanction, the sanctions given will be publicised on the insolvency service web site and will be remain there for at least a year and finally to try to ensure consistency the RPBs have agreed to use the same independent individuals for key roles in their appeal processes.

Insolvency fees review

Yet again the fees charged by IPs are being scrutinised by BIS and this review will be led by Professor Elaine Kempson from the University of Bristol. A report is expected in summer 2013. It will be interesting to see whether this results in further intervention by BIS.

Consultation: Energy supply administration cost recovery mechanism

The government is proposing to set up a cost recovery mechanism where companies which have entered administration trade at a loss. The Secretary of State would issue a direction to National Grid in its role as the national system operator, to raise, through the charges it levies on gas shippers and electricity suppliers, a specified sum to cover any unmet expenses of the energy supply company administration. The Department of Energy and Climate Change (DECC) has released a consultation paper which seeks views on the proposals. The consultation will close on 15 March 2013.

HMRC Liverpool new number

HMRC National Insolvency Unit, Liverpool has a new telephone number tel:03000 540 808.

Statutory Employee Limit

The statutory employee limit is increased from £430 to £450 from 1 February 2013.

SIP 13 CTD

Para 5.3

Where there is a sale of the assets without a professional valuation being obtained then the office holder is expected to document "enquiries as to the value of the assets". It is also recommended that the office holder in these circumstances seeks the opinion of any committee that is in place.

Another interesting detail in the SIP is the understanding that the maximum amount for each asset doesn't have to be obtained "if disposal of a parcel of assets or the assets as a whole will, in aggregate, maximise total realisations".

Para 6

The office holder is not required to obtain sanction from the creditors or the committee, although he is recommended to obtain the views of the committee where there is expected to be a sale of the assets to a connected party.

Para 6.6

Last but by no means least, the details of the full disclosure requirements when there is a sell of the assets to a connected party. For some reason full disclosure never seems to occur, whether by oversight or a junior member of staff drafting the report. The only practical way around this problem is to possibly have the details of what needs to be disclosed under SIP 13 in your proforma for your first report to creditors or in your proposal document. Therefore staff will not only have to think about whether there was a sale, but will also have all the information that needs to be disclosed readily available.

Author

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